2-19-2009

Northwest Pipeline Corp. v. Luna Appellant's Brief Dckt. 35469

IN THE SUPREME COURT OF THE STATE OF IDAHO

NORTHWEST PIPELINE CORPORATION, a Delaware corporation,	**SUPREME COURT NO. 35469**
Plaintiff-Respondent,	
vs.	
JOSE LUNA and ROSANNA LUNA, and their marital community and STEVEN CHURCH and ELIZABETH CHURCH, and their marital community,	
Defendants-Appellants.	

APPELLANTS' BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho in and for the County of Kootenai

Honorable Lansing L. Haynes, presiding

Susan P. Weeks
James, Vernon & Weeks, P.A.
1626 Lincoln Way
Coeur d'Alene, ID 83814
(208) 667-0685/(208) 664-1684 FAX

Attorneys for Defendants-Appellants

Todd Reuter
Preston Gates & Ellis, LLP
1200 Ironwood Dr., Suite 315
Coeur d'Alene, ID 83814
(208) 667-1839/(208) 765-2494 FAX

Attorneys for Plaintiff-Respondent

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A. NATURE OF THE CASE

Northwest Pipeline Corporation ("Northwest") holds an easement across the property of Jose and Roxeanne Luna ("Luna"), husband and wife and Steven and Elizabeth Church ("Church"), husband and wife. It is indefinite as to width. Northwest Pipeline requested the trial court declare its right of way width; eject Defendants and any encroachments from the declared right of way, quiet title in its favor; and award it damages. Luna and Church answered, denying that they had interfered with Northwest's easement rights and seeking a ruling that if they had encroached that their encroachments had extinguished or partially extinguished the easement.

B. COURSE OF THE PROCEEDINGS

Northwest filed its complaint in this matter on April 24, 2006. R 010-022. Church and Luna answered June 8, 2006. R 023-038. The Court heard and denied Northwest's motion for summary judgment on February 22, 2007. R 317-388. Church and Luna filed amended answers on March 6, 2007. R 319-333. A court trial on all issues was held August 20 -27 22, 2007 and the remaining portion on September 10-12, 2007. Following receipt of post-trial briefing, the trial court issued its opinion November 23, 2007. R 416-428. A motion for reconsideration was filed December 7, 2007. Following hearing on the motion, the trial court issued a final decision March 31, 2008. R 568-579. A judgment and decree was entered May 16, 2008. R 579-607. A notice of appeal was filed June 27, 2008.

C. CONCISE STATEMENT OF FACTS

Jose and Roxeanne Luna ("Luna") own Lot 4, Kellogg's Fourth Addition, Kootenai County, Idaho, commonly identified as 2005 Kellogg Lane, Post Falls, Idaho. Their lot is

bordered by Kellogg Avenue on the eastern side. Plaintiff's Exhibit 14. There is a chain link fence that is over the pipeline and constitutes a boundary fence between Luna's property and the property immediately to the north. Defendant's Exhibit UU, page 4 of 14. Luna's home has an attached two-car garage. From the overhang of the northeast corner of the 2 car garage, the attached garage is 11'6" from the pipeline. There is also a boat shed that is 4'8" from the overhand of its eave to the pipeline. Plaintiff's Exhibits 20 and 22; Tr Vol. I, p. 546, L. 1-23. The fence was on the property when Luna's predecessor purchased it in 1983, as was the attached garage. Tr Vol. II, p. 803, L. 2-24.

Steven and Elizabeth Church ("Church") own Lot 10, Kellogg's Fourth Addition, Post Falls, Idaho, commonly identified as 2006 Kellogg Lane, Post Falls, Idaho. R p. 011. Their lot is bordered by Kellogg Avenue on the western side. Plaintiff's Exhibit 14. The lot is approximately 95 feet wide and 135 feet deep. Tr Vol. II, p. 700, L. 8-14. Elizabeth Church purchased the property in February 2005, and moved into it in July 1995 after it was remodeled. At that time, there were two spruce trees which were approximately five feet high on the property, located approximately four to eight feet from Church's northern property line. These trees were visible from the street. Tr Vol. I, p. 462, L. 17-25; p. 463, L. 1-10; Tr Vol. I, p. 500, L. 16-18; Tr Vol. II, p. 690, L. 10-22; p. 691, L. 13-25; p. 692, L. 1-2. One spruce is now approximately 25 to 27 feet tall and the other is between 23 to 25 feet tall. There was a fence on the property when Church purchased. Tr Vol. II, p. 690, L. 23-25; p. 691, L. 1-5. A portion of the chain link fence is over the pipeline and constitutes a boundary between Church's property and the neighbor to the north. Defendant's Exhibit UU, page 5 of 14. There is also a shop on the Church property which was built in 1999. Tr Vol. II, p. 697, L. 18-23.

Kellogg's Fourth Addition is located in the Northwest Quarter of the Northeast Quarter

(NW ¼ NE ¼) of Section 34, Township 51 North, Range 5 West, Boise Meridian, Kootenai County, Idaho and was filed for record with the Recorder one June 12, 1975 and recorded in plat Book E, page 193 as Instrument No. 674776. Plaintiff's Exhibit No. 14.

On April 16, 1956, Harold and Mabel Hodges executed a contract which granted to Pacific Northwest Pipeline Corporation and its successors and assigns right of way for a pipeline or pipelines over a 10 acre parcel described as the East Half of the West Half of the Northwest Quarter of the Northeast Quarter (E½ of W ½ of NW ¼ NE ¼). The consideration was established at one dollar per lineal rod of pipe installed. The contract was recorded and the company constructed a pipeline 20 rods long. Defendant's Exhibit "E". Jose and Roxeanne Luna, husband and wife, and Steven and Elizabeth Church (hereinafter Luna and Church respectively) succeeded to the interest of the Hodges and Northwest Pipeline Corporation (hereinafter Northwest) succeeded to the interest of Pacific Northwest Pipeline.

Under the terms of the contract, Pacific Northwest Pipeline Corporation was granted "the right to select the route for and construct, maintain, inspect, operate, protect, repair, replace, alter or remove a pipeline or pipelines for the transportation of oil, gas and the products thereof, on, over and through" the Hodges property. The contract also granted Pacific Northwest Pipeline Corporation right of ingress and egress to and from the line or lines for the foregoing purposing. Pacific Northwest Pipeline Corporation agreed that after it had selected the route for the pipeline that it would pay Hodges one dollar per lineal rod of pipeline so surveyed and established. The contract indicated on its face that it covered 20. The Right of Way Contract also specified that the Hodges would have the right to use and enjoy the described premises, except as to the rights granted; and that the Hodges agreed not to build create or construct or to permit to be built, created or constructed any obstruction, building,

engineering works, or other structures over or that would interfere with said pipeline or lines or Grantee's right under the contact. Pacific Northwest Pipeline Corporation agreed to pay any damages which may arise to growing crops, pasturage, timber, fences or buildings from the exercise of rights granted in the contract, and if damages were not mutually agreed upon that they would be ascertained and determined by three disinterested persons, one to be appointed by the Hodges (or their successors, heirs or assigns), one to be appointed by the Grantee (or its successors or assigns) and the third by the two so appointed and that the written award of the three chosen individuals would be final and conclusive. The contract also indicated that if more than one pipeline was laid under the grant at any time, additional consideration calculated on the same basis as the per lineal rod would be paid. The line was referred to as Line No. 516-33. The easement grant did not contain any specific width of the right of way granted.

The pipeline was constructed in approximately 1958. Tr Vol. I, p. 360, L. 9-25. At the time the pipeline was installed, the Hodges property was undeveloped. An aerial photograph taken September 5, 1964 reveals a couple of structures west of the property granted by Hodges. Exhibit "S", 4 of 4. An aerial photograph taken May 23, 1971, shows some roads in place on the east side of the property granted and a small subdivision in the northwest corner of the ten acres. Exhibit "S", 1 of 4. An aerial photograph taken May 8, 1978, shows significantly more development in the area. Exhibit "S", 2 of 4. An aerial photograph taken May 31, 2001, shows the area almost entirely developed as residential. Exhibit "S", 3 of 4.

Northwest's pipeline is managed and maintained from the Spokane regional office. Tr Vol. I, p. 21, L. 21-25; p. 22, L. 1-16. Tom Grant is the District Manager for Northwest. Tr Vol. I, p. 21, L. 21-23; p. 22, L. 5-7. The pipeline in question is the Coeur d'Alene lateral. It begins at Star Road Street in the Spokane Valley, passes through Post Falls and Coeur d'Alene

and terminates at Kellogg, Idaho. It goes through the Luna and Church properties in Post Falls, Idaho. Tr Vol. I, p. 82, L. 10-21. It transports natural gas for Avista, which is the local distribution company. Tr Vol. I, p. 82, L. 22-24. It is a six inch diameter pipeline. R p. 068. The pipeline is buried approximately 30 inches deep. R 074.

Northwest claims that anything within its easement is an encroachment. Tr Vol. I, p. 255, L. 5-13. Northwest does not allow any permanent structures in the right of way. Tr Vol. I, p. 573, L. 22-25; p. 574, L. 1-3. Permanent structures are considered to be anything that can't be moved quickly. Tr Vol. I, p. 574, L. 5-6. Northwest maintains if the servient landowner was going to use the easement area that they were required to talk to Northwest first. Tr Vol. I, p. 537, L. 5-9.

Northwest has an encroachment permit process. Tr Vol. I, p. 573, L. 10-25; p. 573, L. 10-21. Northwest has a form encroachment report for the field operator to fill out when there was an encroachment encountered, and it was standard policy for the operator to prepare the report. Defendant's Exhibit AA; Tr Vol. I, p. 213, L. 7-25; p. 214, L. 1-8.

Mr. Grant testified pipeline technicians are the first to know about encroachments. They are suppose to watch for encroachments and report them to the district manager and the land representatives for the company. Mr. Grant then tries to work with the landowner and takes action to remove the encroachments if needed. Tr Vol. I, p. 206, L. 6-25. Employee Mike Moore has been in the Spokane district since December of 1988, and works in operation. Tr Vol. I, p. 506, LL. 21-25; 507, L. 4-6; 508, L. 9-18. Mr. Moore testified that an encroachment permit is not required for garden sheds because they are not permanent. Tr Vol. I, p. 583, L. 25; 584, L. 1-16. The pipeline across the Luna and Church property has been inspected annually with corrosion surveys and leak surveys. Tr Vol. I, p. 129, L. 1-8. The only

removal of encroachments of which Mr. Grant was aware was those done in connection with the reclamation act discussed later in this brief. Tr Vol. II, p. 791, L. 22-25; 792, L. 1-3.

When Mr. Grant became the manager in 1997, he was aware there were encroachments in the right of way. Tr Vol. I, p. 211, L. 10-23. Northwest had discussed the encroachments in Kellogg's Fourth Addition, but "for some reason through the years they had gone to where it shouldn't be." Tr Vol. I, p. 208, p. 209, L. 1-17. In 2000, Northwest began an internal right of way reclamation project. Tr Vol. I, p. 200, L. 9-25; p. 201, L. 1-9. The Reclamation project included a specific area with a lot of encroachments with which that Northwest was going to address. Tr Vol. I, p. 247, L. 21-25; p. 248, L. 1-4. The mission of the right of way project was to clear right of way of trees that were within 10 feet of the pipeline; to get sheds that were near the pipeline at least five feet away; and look at any fence posts that were within four feet of the pipeline or on the line to make sure no damage was done to the pipeline when the fence was installed. Tr Vol. I, p. 528, L. 1-9. One of the reasons for clearing the right of way was to assist with aerial surveillance. Tr Vol. I, p. 528, L. 10-23. Mr. Grant testified that while doing aerial surveillance, Northwest's view has never been obstructed by buildings in or near the right of way because they don't have any on the right of way. Tr Vol. I, p. 70, L. 25; p. 71, L. 1-16.

The District developed a right of way recovery project, or reclamation, and talking points to discuss with landowners or city government regarding the project. Tr Vol. I, p. 48, L. 20-25; p. 49, L. 1-4. Northwest had a survey and drawing of the right of way encroachments prepared by Hagedorn. Defendant's Exhibit UU; Tr Vol. I, p. 216, L. 18-25; p. 217, L. 1-23. Pictures were taken of the encroachments in 2001. Defendant's Exhibit XX; Tr Vol. I, p. 236, L. 18-25; p. 237-247; p. 248, L. 1-4. The project was set up to address encroachments on the

right of way that Northwest knew existed, to remove them, and make the pipeline space free again so Northwest would be ready at all times to be able to do repairs and emergency work on the right of way. Tr Vol. I, p. 92, L. 15-25; p. 93, L. 1-5.

In 2004, the Pipeline Safety Improvement Act was passed. Tr Vol. I, p. 46, L. 15-24. Mr. Grant indicated the Act required Northwest to do more extensive testing and surveying. Northwest decided as prudent operators that it really needed to take a look at its rights of way and make sure they were "ready to go in any kind of event", which meant getting out to resolve a problem immediately. Tr Vol. I, p. 47, L. 25; p. 48, L. 1-19.

Northwest "rolled out" and announced the project to the public in either 2004 or 2005. Tr Vol. I, p. 94; p. 5-7, p. 92, L. 15-25; p. 93, L. 1-5; Defendant's Exhibit M. Defendant's Exhibit FF contains the talking points developed by Northwest on why it was taking action with respect to its right of way. Tr Vol. I, p. 49, ll. 12-18. This exhibit claimed that the project was being undertaken as part of the Integrity Management Program required by the 2004 Pipeline Safety Improvement Act. Northwest stated that in compliance with this law that it was assessing its pipeline corridor to ensure that it met the requirements of the new law and created the safest possible environment for its facilities. Tr Vol. I, p. 50, L. 19-23. However, Northwest was planning on clearing the right of way before the Federal Pipeline Safety Improvement Act came into effect. Tr Vol. I, p. 249, L. 12-18.

Northwest has always had integrity management plans. The Act required Northwest to increase the amount of pipeline integrity testing. Tr Vol. I, p. 190, L. 14-25; p. 191, p. 192, L. 1-19. It increased the intensity of pipeline assessment. Tr Vol. I, p. 193, L. 14-16. Under the Integrity Management Plan required in the Act, Northwest was required to assess the integrity of its pipeline by either direct assessment of the line; hydrostatic testing of its line or in-line

inspection of the line, or any combination thereof. . Tr Vol. I, p. 52, L. 23-25; p. 1-4. Direct assessment involved looking at the outside condition of a pipeline and required excavation. Tr Vol. I, p. 53, L. 6-18. Hydrostatic testing involved running water through a segment of pipeline at a specified pressure for eight hours and required excavation of the pipeline. Tr Vol. I, p. 53, L. 19-25; p. 54, L. 1-6. In-line inspection required placing "smart pigs" in the gas stream to detect dents, cracks, corrosion. Tr Vol. I, p. 54, L. 7-16. Pipeline repairs occurred through the years, not just as a result of Pipeline Safety Act. Tr Vol. I, p. 198, L. 9-18. The only difference in testing after the Act was that in-line testing was required. Before the Act, Northwest was mostly doing outside testing. Tr Vol. I, p. 54, L. 20-25; p. 55, L. 1-9.

The Right of Way Reclamation Plan was developed independent of the Integrity Management Plan. Tr Vol. I, p. 194, L. 10-19. It was not turned into FERC or DOT. Tr Vol. I, p. 194, L. 16-25; p. 195, L. 1-8. Its relationship to the Act was "indirect". It was really developed to get right of ways "back to where they should have been in the first place." Tr Vol. I, p. 195, L. 1-15

IV. ISSUES ON APPEAL

1. Did the trial court err in concluding that Church and Luna's alleged encroachments on the right of way unreasonably interfered with Northwest's easement rights, yet were not wholly inconsistent with Northwest's use of the easement.

2. Did the trial court err in concluding that Northwest did not need to use its easement until enactment of the Pipeline Safety Act of 2002?

3. Did the trial court err in concluding that there was no extinguishment in whole, or in part, of Northwest's easement?

4. Was there substantial and competent evidence to support the trial court's finding of fact

that Church's and Luna's encroachments unreasonably interfered with Northwest's ability to maintain its easement?

5. Did the trial court err by not analyzing whether Northwest had burdened Church and Luna as little as possible in exercising its easement rights?

6. Did the trial court err in failing to distinguish between Northwest's existing easement rights and its future easement rights in setting the width of the easement?

V. STANDARD ON REVIEW

The question of whether a particular easement is reasonable and commensurate with the intention of the parties when the easement was granted is generally a question of fact for the trial court, and its findings will not be disturbed if supported by substantial and competent evidence. *Boydstun Beach Ass'n v. Allen,* 111 Idaho 370, 377, 723 P.2d 914, 921 (Ct.App.1986).

Review of the lower court's decision is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. *Alumet v. Bear Lake Grazing Co.,* 119 Idaho 946, 812 P.2d 253 (1991). A trial court's findings of fact in a court tried case will be liberally construed on appeal in favor of the judgment entered, in view of the trial court's role as trier of fact. *Lindgren v. Martin,* 130 Idaho 854, 857, 949 P.2d 1061, 1064 (1997); *Sun Valley Shamrock Resources, Inc. v. Travelers Leasing Corp.,* 118 Idaho 116, 118, 794 P.2d 1389, 1391 (1990). A trial court's findings of fact will not be set aside on appeal unless the findings are clearly erroneous. *Ransom v. Topaz Mktg., L.P.*, 143 Idaho 641, 643, 152 P.3d 2, 4 (2006).

The Court exercises free review over the lower court's conclusions of law to determine whether the court correctly stated the applicable law, and whether the legal conclusions are sustained by the facts found. *Burns v. Alderman,* 122 Idaho 749, 752-53, 838 P.2d 878, 881-82 (Ct. App.1992).

VI. ARGUMENT

A. Introduction

This Court has previously had occasion to interpret a Northwest's pipeline contract with terms similar to those in the present case. In *Northwest Pipeline Corp. v. Forrest Weaver Farm, Inc.*; 103 Idaho 180; 182, 646 P.2d 422 (1982), a divided Supreme Court examined the expansible easement rights held by Northwest pipeline pursuant to the contract which allowed multiple pipelines to be built and defined the entire tract as the location over which the pipeline could cross without definitely locating the easement area. The court held the contract was not void for vagueness, even though it did not specify the exact location of additional pipelines. The Supreme Court summarily dismissed Forrest Weaver Farm's argument that it could not build on its property given the indefinite location of future lines, stating that:

> Weaver also advances a theory that he is prohibited from constructing buildings on his property because Northwest may choose to construct a pipeline where the buildings are located. In response to this we need only note that Northwest is limited to a reasonable route, and that the contract provides that Northwest will pay any damages which may arise due to the exercise of their rights under the contract.

In the present case, the trial court failed to appreciate the difference between the various easement rights held by Northwest pursuant to the contract. It made no distinction between the easement that was located and in use, and Northwest's right to lay additional pipelines in the future in its analysis.

In its findings of fact, the trial court indicated that the original intent of the parties was to establish an easement wide enough for Northwest to construct, maintain, inspect, operate, protect, repair, replace, later or remove a pipeline *or pipelines* ... together with the right of ingress and egress. R 417. Northwest claimed in its suit that the alleged encroachments interfered with its ability to install additional lines. R 014. In its findings of fact, the trial court found that the excavation *and* safe installation of a future pipeline entitled Northwest to a 20 foot easement on Luna's and Church's parcels. R 569-570. The trial court indicated on reconsideration that because Northwest's easement was created, but no occasion had arisen for its use, use of the right of way by the servient estate would not be deemed adverse. On that basis, the trial court denied Church and Luna's claim of extinguishment of the easement due to adverse possession. R 571-573.

B. Legal Standards Applicable to the Existing Pipeline Easement

Where the grant of an easement does not specify its location, Idaho courts have long held the initial selection of a location fixes the location, width, course and character of the right of way. *Coulsen v. Aberdeen-Springfield Canal Co.*; 47 Idaho 619; 628-629; 77 P. 542 (1929). A grant indefinite as to width and location must impose no greater burden than is necessary. *Id.* at 628. In *Mc Fadden v. Sein*; 139 Idaho 921, 924; 88 P.3d 740, this Court analyzed the parties' rights under a general grant of easement and held:

> This non-exclusive language creates a general grant of easement. In *Abbott v. Nampa School Dist. No. 131*, 119 Idaho 544, 548, 808 P.2d 1289, 1293 (1991), a general grant of easement was defined as an "easement granted or reserved in general terms, without any limitations as to its use." Accordingly, *Abbott* sets forth several rules governing this type of easement, which apply to the present case. First, "use of the easement includes those uses which are incidental or necessary to the reasonable and proper enjoyment of the easement, but is limited to those that burden the servient estate as little as possible." *Id.* Second, such easements are "of unlimited reasonable use." *Id.* Third, these easements "are not restricted to use merely for such purposes of the dominant

> estate as are reasonably required at the time of the grant or reservation, but the right may be exercised by the dominant owner for those purposes to which that estate may be subsequently devoted. Thus there may be an increase in the volume and kind of use of such easement during the course of its enjoyment." *Id.* Fourth, and significantly, "absent language in the easement to the contrary, the uses made by the servient and dominant owners may be adjusted consistent with the normal development of their respective lands." Id. at 548-49, 1293-94.

There is a difference, however, between the enlargement in the use permitted by the owner of the dominant estate and the enlargement of the physical dimensions of the easement. An easement holder may increase the use of an easement, but may not envelope more land to develop the dominant estate. *Argosy Trust v. Wininger*, 141 Idaho 570, 573, 114 P.3d 128 (2005).

The owner of the servient estate retains all rights to the property, except as limited by the easement, and may use the land burdened by the easement as long as the use does not unreasonably interfere with the easement holder's rights. *Kolouch v. Kramer*, 120 Idaho 65, 813 P.2d 876 (1991); *Luce v. Marble*, 142 Idaho 264, 127 P.3d 167 (2005). In *Boydstun Beach v. Allen*, 111 Idaho 370, 377, 723 P.2d 914 (Ct. App. 1986), the Court held where the grant was general in nature the owner of the servient estate was entitled to use the estate in any manner not inconsistent with, or which did not materially interfere with, the use of the easement by the owner of the dominant estate. In other words, the servient estate owner is entitled to make uses of the property that do not unreasonably interfere with the dominant estate owner's enjoyment of the easement. *See Carson v. Elliott*, 111 Idaho 889, 890, 728 P.2d 778, 779 (Ct. App. 1986).

C. The Trial Court's Ruling was Internally Inconsistent Regarding Luna's and Church's Claim of Adverse Possession and Statute of Limitation Defense on the Existing Easement

The trial court found that the Plaintiff's use of equipment to excavate the pipeline for repair or maintenance would be impeded by permanent structures within 20' of the either side of the pipeline. The trial court also found that large structures with concrete foundations or footings interfered with Plaintiff's right to maintain and repair its pipeline. The court further found that fence posts and trees could scratch or otherwise damage the protective coating on the pipeline and therefore unreasonably interfered with Plaintiff's rights. The court ordered that Luna was allowed to leave their home in place, but in the event of an emergency situation that they were required to remove it at their expense and had to indemnify Northwest and its contractors for any liability. The trial court ordered the Luna fence could be removed and replaced at the same location at Northwest Pipeline's expense. The trial court ordered that the Church's shop, lean-to and trees were encroachments. The trial court ordered that Church was allowed to leave the shop in place, but if an emergency existed which required removal of the shop, Church was required to alter or remove it at their expense and had to indemnify Northwest or its contractors. The trial court ordered the lean-to removed by Church. The trial court ordered the Church fence could be removed and replaced at the same location at Northwest Pipeline's expense. Finally, the trial court determined that if Northwest decided to remove the two spruce trees, it could replace them with three foot spruces in an area of Church's choosing outside the right of way at Northwest's expense.

The Church's shop was built in 1999 (seven years before suit was brought). It remained in place over the objection of Northwest, who claimed it had a 30 foot assumed easement on Church's property. Defendant's Trial Exhibit No. 36. The Church's fence and trees were in their present location since at least 1995. The Luna's home and attached garage and fence have been in place since at least 1985.

In an incongruous ruling, the trial court found that Church had not established a claim of adverse possession for the fence, shop and trees on their property and that Luna had not established a claim of adverse possession for their home with attached garage and fence sufficient to extinguish the easement because they had not been in exclusive possession of the easement area and their use was not wholly inconsistent with Northwest's rights. Yet at the same time, the trial court ordered removal of these encroachments because they unreasonably interfered with Plaintiff's easement rights.

The trial court arrived at its conclusion based upon the law that where an easement was created but no occasion had arisen for its use it, the statutory period for adverse possession did not run. The trial court concluded that the need to use the right of way in the present case did not arise until the passage of the Pipeline Safety Act of 2002 and the Plaintiff's demand for removal of improvements from its right of way in 2005. On reconsideration, the trial court clarified its analysis, indicating that because the grant of the right of way did not include a width, Defendants did not know the width and therefore their use of the right of way for their encroachments could not be hostile to Northwest's rights to use the easement. The court further stated that Plaintiffs did not have occasion to need or use all the rights granted it until the enactment of the Pipeline Safety Improvement Act of 2002.

The trial court's legal conclusions are not supported by the facts as found by the trial court. The trial court concluded that the Pipeline Safety Improvement Act of 2002 triggered the need for Northwest to exercise its rights to maintain and repair the pipeline and established the necessity for the use of the entire 20 foot right of way width in total.

Under Idaho law, the easement width was established for the existing pipeline easement when it was laid out and constructed in 1958. *Coulsen v. Aberdeen-Springfield Canal Co.*;

supra. There could not exist a dormant easement width that could be triggered by later events, such as might occur with an express easement containing a width wider than the current needs of the easement holder. *See Winn v. Eaton,* 128 Idaho 670, 673, 917 P.2d 1310, 1313 (Ct.App. 1996).

Further, subsequent regulations could not increase the width of the easement. As the court noted in *Argosy Trust v. Wininger*, 141 Idaho 570, 573, 114 P.3d 128 (2005), an easement holder can not widen the physical dimensions of an existing easement because the easement holder's needs have changed. Thus, to the extent the trial court intended to hold that the existing easement was broadened because of the Act, its decision is erroneous.

Finally, the trial court's conclusion that the passage of the Act triggered the need to use the existing easement is also unsupported by the facts as found. The lengthy discussion included in the Statement of Facts demonstrates that Northwest maintained and repaired its pipeline long before the passage of the Act. The need to excavate to repair and maintain the pipeline pre-existed the Act. The Act did nothing to change the need for repairs or the equipment used for repairs. The Act required Northwest add internal in-line integrity assessment ("smart pigging") as part of its pipeline integrity management plan, which does not involve excavation of the pipeline. Thus, if 20 feet was the width necessary to accommodate the equipment used by Northwest to excavate the pipeline as found by the trial court, that need has existed since the time the pipeline was installed. If the above encroachments currently unreasonably interfere with Northwest's ability to excavate and maintain its pipeline, then they have always done so. If they previously were not inconsistent with Northwest's use of the easement, then they are not disallowed.

D. Church and Luna Established an Extinguishment of The Easement

The Right of Way Contract prohibits the Grantor from, "building or constructing or allowing any obstruction, building, engineering work or other structure over or that would interfere with the pipeline". It is undisputed that Church and Luna's predecessors constructed a chain link fence over the pipeline. Luna's fence was in place well over 20 years at the time Northwest filed its cause of action. Church's fence had been in place at least 11 years at the time Northwest filed. It is also undisputed that tree roots damage the pipeline. The spruce trees in Church's yard were in place since at least 1995.

Northwest gave extensive testimony that fences interfered with its easement. In May 2006 and again in November 2006, Northwest sent an informational letter to landowners informing that it would be doing a right of way reclamation project, including moving fences four feet back off the pipeline and re-establishing them paralleling to the pipeline. Defendant's Exhibit QQ; Tr Vol. I, p 266, L. 14-17. The concern with fences was that during installation they would damage the pipeline by scratching the pipeline coating. Tr Vol. I, p. 511, L. 9-17. Mr. Moore testified that the fences over the pipeline were inconsistent with Northwest's ability to maintain the lines because the fences would need removed in the event work needed to be done on the pipeline. Tr Vol. II, p. 601, L. 7-22. Mr. Moore testified that the policy against fences over the pipeline had been in effect since he started with Northwest in1982. Tr Vol. II, p. 601, L. 23-25; 602, L. 1-12.

Mr. Moore first visited the Luna property for work in 1989, but he did not know when he may have first visited it. Tr Vol. I, p. 578, L. 25; 579, L. 1-3; L. 16-18. When Mr. Moore first visited the property, the fence was there and the attached garage was there. Tr Vol. I, p. 580, L. 9-14. Mr. Moore reported the fence and garage to the manager of the company, Ron Walker, before 1991 or 1992. Tr Vol. I, p. 580, L. 18-25; 581, L. 1-16. Mr. Moore observed

the Church fence in the same time period, although he was not looking at the trees. Tr Vol. I, p. 582, L. 17-24.

Church and Luna asserted extinguishment of the easement through adverse possession. In *Winn v. Eaton*, 128 Idaho 670, 673, 917 P.2d 1310, 1313 (Ct.App. 1996), the Court of Appeals held that:

> The party asserting a claim of adverse possession must prove by clear and satisfactory evidence that he or she has been in exclusive possession of the property for at least 5 years and that the possession has been actual, open, visible, notorious, continuous and hostile to the party against whom the claim of adverse possession is made. I.C. §§ 5-207 through 5-210; Kolouch v. Kramer, 120 Idaho 65, 67-68, 813 P.2d 876, 878-79 (1991); Shelton v. Boydstun Beach Assoc., 102 Idaho 818, 819, 641 P.2d 1005, 1006 (Ct.App.1982). When applied to extinguishing an easement, the elements of exclusivity and hostility require that the land owner use the property within the boundaries of the easement in a manner wholly inconsistent with enjoyment of the easement. Shelton, 102 Idaho at 820, 641 P.2d at 1007.

The trial court ruled that extinguishment of the easement had not occurred because Northwest did not have occasion to use the "remaining width" of the existing easement and the uses by Church and Luna were not hostile. However, by its own testimony, Northwest established that the fence and trees were encroachments that existed prior to the passage of the Pipeline Safety Act which were hostile to its maintenance of the pipeline and unreasonably interfered with its easement rights. Without the ability to remove the fence, the remaining issues regarding the reasonable width necessary in 1958 for maintenance of the existing easement become moot as Northwest is unable to excavate with the fence and trees present.

E. The Remaining Encroachments did not Impair Northwest's Existing Right of Way Easement

Should the Court disagree with Church and Luna's position regarding the fence and trees, Church and Luna submit that there is not substantial and competent evidence to support the trial court's finding and conclusion regarding maintenance of the easement. The trial court

found that Northwest required 20 feet of easement on Luna's and Church's property to exercise its easement rights with respect to the existing pipeline and that the alleged encroachments on Church and Luna's properties impeded their ability to exercise its easement rights

The pipeline constructed in 1958 is an existing easement. It is not exclusive. Under the law, Church and Luna are prohibited from unreasonably interfering with Northwest's easement rights. At the same time, Northwest is to burden Luna's Church's property as little as possible in exercising its easement rights.

Northwest does not claim that it is obstructed from exercising the right to maintain and repair its pipeline granted in the easement. Rather, it claims that Church's trees, fence and lean-to and Luna's attached garage, the above items make it more difficult for it to exercise its rights to maintain and repair the pipeline under the easement. The trial court found that Northwest's use of equipment to excavate for repair or maintenance would be "impeded" by permanent structures within 20 feet on either side of the pipeline. R 419, Finding of Fact 14. However, the trial court made no finding and engaged in no discussion of the nature of the impediment to Northwest presented by the encroachments it claimed existed on Church's and Luna's properties.

Encompassing the issue of use by the servient estate, Northwest testified that it was concerned about encroachments that stopped it from "getting in there in a quick way or repair or take care of any unsafe condition there. Any kind of permanent structure, that kind of thing." Tr Vol. I, p. 65, L. 23-25, p. 66. L. 1-5; p. 71, L. 18-25; p. 72, L. 1. The following exchange occurred between Mr. Grant and Luna and Church's counsel at trial:

> Q. Now, could you, in your experience in this industry, do an excavation project with some kind of smaller equipment? Or, you know, where you would shuttle buckets [of spoil] out one bucket at a time?

A. We would probably not do that. And the reason I would say that is, again, it all goes back to the timing on the project. If you're in there doing an emergency dig or if you're in there repairing pipe, you're not going to pick some little piece of equipment to dig it out. You're going to get in there and get the job done using bigger equipment.

Q. What's that?

A. You're going to get in there and do your job in a fast manner so that you have the least amount of outage as possible.

Vol. I, p. 105, L. 10-24.

In further exploring the concern about outages, Northwest confessed it has never had an outage on the pipeline because maintenance and repair work and pipeline replacement are coordinated with stoppel bypass. Northwest hires a specialized company to reroute the gas and bypass the segment of line where work is being performed so that there is no cessation in the flow of gas. This process is stoppel bypass. Tr Vol. I, p. 269, L. 2-25; p. 270-271 p. 272, L. 1-19. This process takes approximately two days to put in place prior to the repair occurring. Tr Vol. I, p. 275, L. 4-13.

Northwest Pipeline doesn't do its own pipeline excavation. It has done away with all of its equipment. It hires third party operator-qualified contractors. Tr Vol. II, p. 792, L. 11-21. In the event of an emergency, it chooses from a list of available contractors. Tr Vol. II, p. 792, L. 22-25; p. 793, L. 1-9. Northwest is required by Department of Transportation to only allow certified operators to work on the pipelines. This requirement has been in effect for four or five years. Tr Vol. II, p. 793, L. 10-25; 794, L. 1-22.

The issue of excavating the pipeline across the Church and Luna property was explored in depth at trial. Northwest chose not to call any of its certified operators to testify at trial. Nonetheless, Northwest contended it needed 20 feet of right of way on each side of the pipeline to maintain the pipeline. Tr Vol. I, p. 255, L. 2-4. However, Plaintiff testified that the 40 foot

width was needed in large part because it planned to loop a line in the future. Tr Vol. I, p. 25, L. 11-25; p. 26, L. 1-6. A loop is the process of adding an additional pipeline. Tr Vol. I, p. 416, L. 22-25; p. 417, L. 1-2. Mr. Grant testified that he believed that in the future Northwest would need to loop the Coeur d'Alene lateral. Tr Vol. I, p. 98, L. 11-21. This second line was anticipated to be placed in a five foot deep trench. Tr Vol. I, p. 396, L. 23-25; p. 397, L. 1-6. The 40 foot right of way was necessary to safely install and maintain the loop line. Northwest claimed that it could safely excavate the future adjacent loop line in less than 15 feet of right of way, but conceded it would be slower. Tr Vol. I, p. 382, L. 4-25, 383-385; 386, L. 1-6.

Despite taking the position that it could excavate and repair a pipeline buried five feet deep in a 15 foot right of way, Plaintiff's prepared a schematic for trial to demonstrate why it needed 40 feet of right of way for an excavation less than three feet deep R 114. This schematic was introduced at trial as Defendant's Exhibit W. Defendant's Exhibit W was prepared by Plaintiff for purposes of the litigation and was not part of any existing policy manual. Northwest maintained that Defendant's Exhibit W showed how pipelines were excavated in the field by its certified operators. Tr Vol. II, p. 603, L. 9-25; 604, L. 1-10.

Testimony at trial demonstrated that the schematic was not accurate. Mr. Grant testified that the excavator can dig next to the pipeline (but not across it) and can go across the pipeline to deposit the spoils (excavated dirt) on the other side of the easement. Tr Vol. I, p. 400, L. 18-25. Mr. Grant conceded that Plaintiff's Exhibit 7, which showed a machine on the same side as the spoil, did not follow the illustrative litigation diagram Northwest prepared. Tr Vol. I, p. 284, L. 13-24. Mr. Grant testified that the operators are not allowed to straddle the pipeline, unless the pipeline was deep enough. Tr Vol. I, p. 401, L. 7-11. Pictures taken by Northwest's employees from the reclamation project showed Northwest's certified operator excavator

straddling the pipeline and digging parallel to the side of the pipeline. Northwest conceded there were no reported violations on the project. Tr Vol. II, p. 623, p. 624-626, p. 627, L. 1-13, Defendant's Exhibit SSS.

A large portion (fifteen feet) of the width of right of way that Northwest claimed it needed was for storing spoils from the excavation. Northwest conceded at trial that the excavator did not have to pile the spoils on the opposite side of the pipeline easement as depicted in Defendant's Exhibit W. Northwest acknowledged that the spoils could be shuttled to the adjacent street (Kellogg Lane). Northwest's concern was that utilizing this procedure would be slower. Vol. I, p. 122, 6-25; p. 123, L. 1-3. Mr. Grant estimated that shuttling the spoils to the street would take about a third more time although he acknowledged that a truck could be moved ahead of the excavator equipment which would speed up the process. Tr Vol. I, p. 127, L. 9-25.

Northwest's employee, Mike Moore, testified that during the three years that he regularly worked on the Coeur d'Alene lateral, Northwest was never unable to maintain the Coeur d'Alene lateral because of limited right of way widths. Mr. Moore testified that there were structures, including the Luna's garage, the Churches' shop, and the Blashka's house (a nearby house that was 13 feet from the right of way)[1], that would not allow the use of the larger equipment because it would not allow for the equipment to safely swing during operation. Tr Vol. II, p. 606, L. 22-25; 607-608; 609, L. 1-15. Mr. Moore acknowledged that he had never personally operated any of the heavy equipment which would be used to excavate the pipeline, but had observed the operation of such equipment as part of his job. Tr Vol. II, p. 621, L. 4-12.

[1] Tr Vol. I, p. 564, L. 17-24; p. 565, L. 15-25; p. 566, L. 1-16.

At trial, Defendants presented the expert testimony of Gary Sterling, a heavy equipment operator with 36 years experience. Mr. Sterling had worked for the City of Coeur d'Alene and subsequently began operating his own excavating business, Wolf Lodge Excavating, in 1984. He was semi-retired at the time of trial. He had experience with backhoes, dozers, graders, water trucks, lowboys, dump trucks, front-end loaders, mini-loaders and large loaders. He had not operated a crane because it required a special license to do so. Tr Vol. II, p. 817, L. 15-25; 818, L. 1-8.

Mr. Sterling also had experience working on gas pipelines under pressure through contract work for Yellowstone Pipeline. Tr Vol. II, p. 818, L. 22-25; p. 819, L. 1-11. Mr. Sterling's company was the primary excavator for Yellowstone Pipeline in the territory from the Montana divide at Thompson Pass to Post Falls, Idaho. Tr Vol. II, p. 820, L. 7-20; p. 821, L. 4-5. Mr. Sterling had seven employees and never was injured on the job, nor were any of his employees ever injured on the job. Tr Vol. II, p. 819, L. 12-19. Mr. Sterling's testified that when excavating the excavator protects his employees, he protects the homeowner, he protects structures, he protects the pipeline, and he protects the pipeline company. Tr Vol. II, p. 828, L. 24-25; p. 829, L. 1-8.

Mr. Sterling testified to the mechanics of excavating a pipeline. Mr. Sterling had dug thousands of trenches throughout his career. Mr. Sterling testified that the size of a trench needed in excavation was a function of the depth of the pipeline and the materials (soils) being dug. Tr Vol. II, p. 821, L. 6-25. He indicated that the excavator moves backwards so that the excavator is always looking at what he was digging. Tr Vol. II, p. 822, L. 1-5. Mr. Sterling used Defendant's Exhibit SSS, a photograph taken during the reclamation project by a Northwest employee, to illustrate his testimony. This photograph depicted an individual in a

track hoe digging near Northwest's pipeline. The track hoe was straddled over the pipeline, and the excavator was digging to the side and parallel to the pipe. Tr Vol. II, p. 825, L. 19-25; p. 826-827; p. 828, L. 1-8. Tr Vol. II, p. 874, L. 25; p. 875, L. 1-5. Mr. Sterling testified if the pipeline were to be excavated on the Luna property, the excavator would start near the western fence and move east toward the street. Tr Vol. II, p. 823, L. 6-25; p. 824, L. 1-14.

Mr. Sterling testified regarding the ability of Northwest to use smaller excavation equipment. Mr. Sterling indicated that Defendant's Exhibit XXX was a mini-excavator that was approximately 5'4" wide. Mr. Sterling testified mini-excavators can be as small as four feet wide and can include an extend-a-hoe for a wider reach. Mr. Sterling testified a mini-excavator has zero tail swing, which means when they are swiveled during operation they remain over the tracks and there is no risk of hitting building or other object with the tail of the machine, which is a risk when operating a larger piece of equipment, such as the track hoe illustrated in Plaintiff's Exhibit 81. Tr Vol. II, p. 833, L. 15-25, p. 834, p. 835, p. 836, L. 1-13.

Mr. Sterling testified that the larger pieces of equipment illustrated in Plaintiff's Exhibit 35 and the piece of equipment depicted in Defendant's Exhibit SSS were too wide to safely excavate the pipeline on the Church and Luna property. Tr Vol. II, p. 857, L. 13-25; p 858, L. 1-25. Mr. Sterling offered unrebutted expert testimony with the use of a mini-excavator, an excavator could safely dig the same type of trench as shown in Plaintiff's Exhibit Nos. 7 and 8 on Luna's property with the boat shed in place. Tr Vol. II, p. 837-838; p. 839, L. 1-15.

With respect to the Church property, Mr. Sterling again testified that the pipe could not be excavated with the larger machines. He offered unrebutted expert testimony that with a mini-excavator that the pipeline could be excavated, and the excavation could be done parallel to the pipeline. Tr Vol. II, p. 840, L. 20-25; p. 841, p.842, L. 1-21. Regarding the storing of

the soils, Mr. Sterling also testified that the spoils could be placed in the right of way north of the Church and Luna property assuming it was 20 feet wide. Tr Vol. II, p. 873, L. 9-20. Mr. Sterling also testified the spoils could be placed in a truck backed in behind the mini-excavator. Tr Vol. II, p. 863, 14-25; p. 864-865, p. 866, L. 1-17.

Mr. Sterling agreed on cross-examination that using a smaller piece of equipment makes the excavation take longer than using a piece of equipment with a larger bucket. Tr Vol. II, p. 868, L. 14-20. Mr. Sterling indicated that the fences were in the way of any excavation and would have to be removed to excavate the pipeline. Tr Vol. II, p. 876, L. 12-16.

Thus, the substantial and competent evidence was that a smaller piece of equipment could be used safely to excavate around the encroachments on the Luna and Church parcels, except for the fences. The fact that it would take slightly longer to excavate the pipeline must be balanced against the requirement that Northwest burden the Defendants as little as possible in the exercise of their easement.

F. The Trial Court Erred in Considering Northwest's Needs for a Loop Line in Determining the Right of Way Width

The trial court allowed testimony over Church and Luna's objection that Northwest monitors demand and believed that that it would need to loop the Coeur d'Alene Lateral. Mr. Grant testified at sometime in the near future Northwest would need additional pipelines even though there was no active project right now to loop. Tr Vol. I, p. 98; L. 5-25; p. 99, L. 1-16. Plaintiff testified that the 40 foot width was needed in large part because it planned to loop a line in the future. Tr Vol. I, p. 25, L. 11-25; p. 26, L. 1-6. A loop is the process of adding an additional pipeline. Tr Vol. I, p. 416, L. 22-25; p. 417, L. 1-2. Mr. Grant testified that Northwest anticipated placing the additional line in a five foot deep trench adjacent to the current line. Tr Vol. I, p. 396, L. 23-25; p. 397, L. 1-6. Mr. Grant maintained the 40 foot right

of way was necessary to safely install and maintain the loop line. Tr Vol. I, p. 382, L. 4-25, 383-385; 386, L. 1-6.

Under the contract, Northwest is required to pay damages when it adds lines, including damages for removing buildings. This Court anticipated in *Northwest Pipeline Corp. v. Forrest Weaver Farm, Inc.*; 103 Idaho 180; 182, 646 P.2d 422 (1982) that Northwest would pay for additional lines added in the future under the contract. This court did not hold that Northwest could engage in right of way corridor protection for future lines by bringing an action to declare a right of way width to accommodate such future growth.

The trial court did not engage in the proper analysis of this issue. It did not separate the right of way needs of the additional lines from the right of way needs of the existing easement. Even though the trial court was presented undisputed testimony from Northwest that 15 feet of the 40 feet was requested to accommodate the future pipeline, the trial court did not address this factor in determining the right of way width needed for the existing right of way. Tr Vol. I, p. 382, L. 4-25, 383-385; 386, L. 1-6. Finally, the trial court did not analyze whether the additional line laid next to the existing line was a reasonable, convenient and accessible way. *See Quinn v. Stone,* 75 Idaho 243, 250, 270 P.2d 825, 830 (1954). Under the circumstances of this case, Church and Luna do not believe laying another pipeline in close proximity to the existing line is reasonable. Church and Luna presented evidence that there are public streets that lie within the legal description of the grant from Hodges that could be used to lay additional lines, and would be more appropriate.

VII. CONCLUSION

Northwest should not be allowed to utilize the Pipeline Safety Act of 2002 to circumvent established easement law. Churches and Lunas are entitled to have this case

analyzed the same as any other easement case irrespective of the enactment of the Pipeline Safety Act of 2002. Northwest should not be allowed to use the Act as a panacea to clear its right of way of encroachments that it has long considered to be problems, obtain greater easement widths than it has used in the past and protect a future corridor for additional lines without the need to pay damages to the landowners under the contract.

RESPECTFULLY SUBMITTED this 13TH day of February, 2009.

JAMES, VERNON & WEEKS, P.A.

Susan P. Weeks

SUSAN P. WEEKS
Attorneys for Defendants/Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of February, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Todd Reuter
Preston Gates & Ellis, LLP
1200 Ironwood Dr., Ste. 315
Coeur d'Alene, ID 83814

- ☑ U.S. Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (FAX)

Christine Elmore